

NATIONAL HUMAN RIGHTS CONSULTATION

SUBMISSION OF THE VICTORIAN GOVERNMENT

TABLE OF CONTENTS

| | |
|--|-----------|
| EXECUTIVE SUMMARY | 2 |
| INTRODUCTION | 4 |
| PART 1: THE VICTORIAN CHARTER EXPERIENCE TO DATE | 5 |
| 1 The Victorian Human Rights Consultation and the views of the Victorian community | 5 |
| 2 The Charter model and its key features | 7 |
| 3 Activities undertaken by the Victorian Government in preparation for the commencement of the Victorian Charter | 8 |
| Leading the Implementation..... | 9 |
| Education and communication..... | 9 |
| Legislative and policy review | 10 |
| 4 The impact of the Victorian Charter on government | 11 |
| Legislation..... | 11 |
| Service delivery..... | 13 |
| Additional functions..... | 14 |
| Local Government..... | 15 |
| Examples | 16 |
| Challenges | 18 |
| 5 The impact of the Victorian Charter on the courts since 1 January 2008 | 19 |
| 6 The costs of implementing the Victorian Charter | 21 |
| 7 The review of the Victorian Charter in 2011 | 21 |
| 8 Conclusion | 22 |
| PART 2: RESPONSE TO THE TERMS OF REFERENCE OF THE NATIONAL CONSULTATION | 23 |
| 9 The Victorian Government supports the enactment of a Federal Charter. | 23 |
| Improve national human rights protections | 23 |
| To provide governance standards for government | 24 |
| Provide additional protection for disadvantaged people | 25 |
| To educate people about their rights and responsibilities and encourage a human rights culture..... | 26 |
| 10 The Victorian Government supports a Federal Charter that preserves the operation of the Victorian Charter and does not undermine Victorian sovereignty. | 26 |
| 11 The Victorian Government’s preference for a Federal Charter that protects civil and political rights, with a view to considering economic, social and cultural rights at a later stage | 28 |
| 12 Conclusion | 29 |
| REFERENCES | 31 |

National Human Rights Consultation: Victorian Government Submission

EXECUTIVE SUMMARY

- a. The Victorian Government welcomes the National Human Rights Consultation ('National Consultation'), and supports the introduction of a charter of human rights at the federal level ('Federal Charter').
- b. Victorian is in a unique position to inform the National Consultation as the first state to enact a charter of human rights.
- c. The Victorian *Charter of Human Rights and Responsibilities Act 2006* ('the Victorian Charter') was the product of a comprehensive community consultation process. The consultation revealed overwhelming community support for a change in Victorian law to better protect human rights with 84% of the 2524 substantive submissions received favouring such a change.
- d. The Victorian Charter is an Act of Parliament which protects civil and political rights. It preserves Parliamentary sovereignty and promotes a dialogue between the various arms of government about human rights protection and the appropriate limits to human rights. It requires Courts to interpret laws consistently with the Charter where possible but does not permit Courts to invalidate legislation that is inconsistent with the Charter.
- e. In preparation for the introduction of the Victorian Charter, the Victorian Government facilitated a substantial government and judicial education and training campaign and reviewed existing legislation for compatibility with the Victorian Charter. These activities were essential to ensuring a smooth implementation process.
- f. A charter of human rights is an important instrument to achieve good governance in the 21st century. Victoria's experience is that human rights legislation improves the transparency and accountability of government. It promotes a culture of valuing human rights across government and strengthens the democratic system by ensuring that decisions are made and policy is developed in the public gaze.
- g. The Victorian Charter has had a substantial impact on Victorian legislative processes which now include a requirement that all Bills are accompanied by a statement of compatibility that explores the human rights impacts of Bills and explains any limitations on rights. The Victorian Charter does not, however, stop the government from taking strong action to protect the community; there are situations in which rights will be limited in the public interest.
- h. It has also had a significant impact on service delivery. The obligation on public authorities is one of the most important features of the Victorian Charter, as it is in the delivery of services by public authorities that most people interact with government on a daily basis. Victoria's experience illustrates that the Victorian Charter is having an important impact on the way the government delivers services, by articulating a clear framework for protecting human rights.
- i. The courts play a crucial role in enforcing the obligation on public authorities and contributing to the human rights 'dialogue' between the various arms of government.
- j. The Victorian Charter is having a noticeable effect on the interpretation of law by the courts and the outcome of proceedings. There have been a number of

National Human Rights Consultation: Victorian Government Submission

significant decisions which indicate that the courts are performing their functions under the Victorian Charter in a measured and careful way, confirming the importance of the Victorian Charter in shedding light on important human rights issues.

- k. In view of the positive experience in Victoria, the Victorian Government supports the introduction of a Federal Charter based on the legislative 'dialogue' model adopted in this state. A Federal Charter would have numerous benefits identified also in the Victorian context, such as improving human rights protections, providing additional protection for disadvantaged people, providing governance standards for government, educating people about their rights and responsibilities and encouraging a human rights culture.
- l. More specifically, the Victorian Government supports a Federal Charter that applies to federal public authorities only and which preserves the operation of the Victorian Charter.
- m. A Federal Charter should take an incremental approach to human rights protection, as the Victorian Charter has done. It should initially protect the same civil and political rights protected in the Victorian Charter and include a review mechanism so that the inclusion of economic, social and cultural rights can be considered in the future.

National Human Rights Consultation: Victorian Government Submission

INTRODUCTION

- i. The Victorian Government is committed to the protection and promotion of human rights and welcomes the opportunity to make a submission to the National Consultation.
- ii. In July 2006, the government enacted the Victorian Charter, which establishes a framework for the protection and promotion of human rights in Victoria. It is the first human rights Charter enacted in any Australian state and is similar in its approach to the *Human Rights Act* enacted in the Australian Capital Territory ('ACT') in 2004. The Victorian Government is therefore in a unique position to inform the National Consultation.
- iii. The Victorian Charter brings together a list of familiar rights that assist people to live with freedom, respect, equality and dignity. Most of the rights have been developed and fought for over centuries through the common law, in the development of national constitutions and international covenants, including many in which Australia has played a key role.
- iv. A charter of human rights is an important instrument to achieve good governance in the 21st century. Similar to other governance frameworks which are now an accepted part of government, such as privacy and freedom of information laws, human rights legislation improves the transparency and accountability of government.
- v. The National Consultation provides an excellent opportunity to communicate the experience of the Victorian Government gained through the implementation of the Victorian Charter and efforts to foster a human rights culture throughout the government and community.
- vi. This submission consists of two parts. The first part details the Victorian Charter experience including:
 - The Victorian Human Rights Consultation and the views of the Victorian community;
 - The Victorian Charter model and its key features;
 - Activities undertaken by the Victorian Government in preparation for the commencement of the Victorian Charter;
 - The impact of the Victorian Charter on government;
 - The impact of the Victorian Charter on the courts since 1 January 2008;
 - The costs of implementing the Victorian Charter; and
 - The review of the Victorian Charter in 2011.
- vii. The second part responds to the Terms of Reference of the National Consultation. It outlines:
 - The Victorian Government's support for the enactment of a Federal Charter.

National Human Rights Consultation: Victorian Government Submission

- The Victorian Government's preference for a Federal Charter that preserves the operation of the Victorian Charter and does not undermine state sovereignty nor interfere with the core functions of state governments.
 - The Victorian Government's preference for a Federal Charter that protects civil and political rights, with a view to considering economic, social and cultural rights at a later stage.
- viii. Victoria is embracing its role as a human rights leader in Australia. By contributing to the National Consultation, the Victorian Government aims to share some of what Victoria has learned in its pioneering trek to better human rights protection.

PART 1: THE VICTORIAN CHARTER EXPERIENCE TO DATE

1 The Victorian Human Rights Consultation and the views of the Victorian community

- 1.1 The Victorian Human Rights Consultation ('Victorian Consultation') originated from the Victorian Attorney General's *Justice Statement* (May 2004). It prioritised the need to ensure that human rights are valued and protected and that issues of inequality and disadvantage are demonstrably addressed by the justice system. The government also announced its intention to conduct a community consultation on alternative models of human rights protection.
- 1.2 The Attorney-General established an independent committee ('the Committee'), chaired by Professor George Williams, to undertake the Victorian Consultation.
- 1.3 The Victorian Consultation process benefited from the publication of clear and appropriately confined Terms of Reference to establish parameters for the consultation. The Committee was asked to make recommendations on a suitable framework for civil and political human rights in Victoria, based on the government's preference for a parliamentary based model focusing on prevention and dispute resolution.
- 1.4 The Committee released a community discussion paper, 'Have your say about Human Rights in Victoria' and made a call for submissions.
- 1.5 The Committee used a range of strategies to ensure that information was distributed widely, particularly to marginalised and disadvantaged communities. These included:
- Sending electronic or hard copies of the discussion paper or the shorter summary document to more than 22,000 people.
 - Establishing a website with an electronic version of the discussion paper and summary (in various languages), as well as specific information for particular groups in the community.

National Human Rights Consultation: Victorian Government Submission

- Placing advertisements and calls for submissions in print media outlets for specific community groups such as Indigenous people, people from culturally and linguistically diverse backgrounds, older people, people from gay/ lesbian/ bisexual/ transgender/ intersex communities and people in faith based communities.
- 1.6 The Committee undertook an extensive grassroots consultation, during which in excess of 2,500 people and organisations provided their views about whether human rights could be better protected in Victoria. This was the highest number of submissions ever received for a process in Australia that had considered this issue.
 - 1.7 During the six month consultation process, the Committee participated in 55 community consultation meetings, information sessions and public forums and 75 consultations with government and other bodies.
 - 1.8 The Committee also visited numerous regional areas across the state so that a geographically diverse mix of Victorians had access to face-to-face forums.
 - 1.9 In addition, the Committee devolved part of the consultation to a number of community agencies who were funded to consult with marginalised groups in their constituency, such as homeless persons. By working with community networks and cooperating with many Victorian organisations the Committee was able to reach many people.
 - 1.10 Not only did the consultation gather views from the community, it was also an important avenue to inform the community about human rights and establish the groundwork for effective community engagement in the human rights dialogue with government.
 - 1.11 The community consultation was conducted concurrently with consultation across the Victorian Government concerning the Victorian Charter. A human rights inter-departmental committee was established which was consulted extensively. This provided an interface between the public sector and the Committee and had the benefit of achieving understanding and support for the Charter across government prior to its introduction to Parliament.
 - 1.12 The Victorian Consultation revealed overwhelming community support for a change in Victorian law to better protect human rights with 84% of the 2524 substantive submissions received favouring such a change. This support came from across the state, in city and rural areas, and across all sections of the community.
 - 1.13 Victorians sought not just a new law but something to help build a society in which government, Parliament, the Courts and the people themselves could have an understanding of and respect for people's rights and responsibilities. The majority favoured a non-constitutional model of human rights protection that would preserve Parliamentary sovereignty.

National Human Rights Consultation: Victorian Government Submission

- 1.14 On 20 December 2005 the Attorney-General launched the Human Rights Consultation Committee Report – *Rights, Responsibility and Respect*. It contained 35 recommendations to the Victorian Government, including that a Victorian Charter should be enacted. At its launch, the Victorian Attorney General announced that the government would proceed with the Committee’s central recommendation, and would enact a Charter of Human Rights and Responsibilities in 2006.
- 1.15 The Victorian Charter was introduced into Parliament on 2 May 2006 and it received Royal Assent on 25 July 2006.

2 The Charter model and its key features

- 2.1 The Victorian Charter is an ordinary Act of Parliament that can be changed by future Parliaments. It involves the three arms of government in a conversation about human rights while Parliament retains the ultimate say about which rights the law should protect, how they should be protected and the appropriate limits to human rights.
- 2.2 Key features of the Victorian Charter are:
- 2.2.1 It protects and promotes civil and political rights, based on the International Covenant on Civil and Political Rights (‘ICCPR’), adapted to the Victorian context.
- 2.2.2 It provides that rights are not absolute and may be subject to reasonable limitations. This important clause allows the government to limit rights to protect the public interest.
- 2.2.3 When introduced into Parliament, new legislation is accompanied by a statement of compatibility that identifies and explains any impacts on human rights. New regulations are accompanied by a human rights certificate that identifies whether the regulations limit or do not limit any human rights set out in the Victorian Charter. This ensures that human rights considerations are at the forefront of the legislative process.
- 2.2.4 The Victorian Charter provides a role for the Scrutiny of Acts and Regulations Committee (‘SARC’) to consider any Bill introduced into Parliament and to report to the Parliament as to whether the Bill is inconsistent with human rights.
- 2.2.5 In exceptional circumstances, Parliament has the power to override the Victorian Charter in respect of provisions that are not compatible with the Charter. This means that the Victorian Charter would have no application to the provisions for a time-limited period.
- 2.2.6 There are no new remedies for human rights breaches, but the courts are required to interpret legislation consistently with the Victorian Charter wherever possible as long as this does not disturb the purpose of the legislation.

National Human Rights Consultation: Victorian Government Submission

- 2.2.7 Courts cannot invalidate legislation passed by Parliament. The Victorian Charter makes clear that statutory provisions are still valid even if they are inconsistent with a human right. However, the Supreme Court may make a declaration of inconsistent interpretation that refers inconsistent legislation back to the Attorney-General for the government to consider.
- 2.2.8 Within 6 months, the relevant Minister must respond formally to the declaration and table the response in both Houses of Parliament. This ensures there is transparency and Parliamentary accountability in the way the government responds to findings of inconsistency by the Court.
- 2.2.9 Public authorities, which include non-government entities carrying out public functions on behalf of government, are bound to observe the human rights contained in the Victorian Charter and take relevant human rights into consideration in making decisions when they carry out those public functions. This provision seeks to ensure that human rights are observed in administrative practice even when governmental functions are contracted-out. The primary means for enforcing this obligation is through the courts as part of the traditional means of reviewing governmental decisions.
- 2.2.10 The Equal Opportunity Commission of Victoria was renamed the Victorian Equal Opportunity and Human Rights Commission ('the Commission') and was given additional functions, which focus on community education, reporting on the operation of the Victorian Charter, intervening in court proceedings in some circumstances, and providing compliance analysis upon request. There is not a complaints handling role, as exists under the *Equal Opportunity Act 1995*.
- 2.3 Of the above features, it is the requirement for new legislation to be accompanied by a statement of compatibility and the obligation on public authorities to act compatibly with human rights that have been the main drivers of cultural change across government, as discussed below.

3 Activities undertaken by the Victorian Government in preparation for the commencement of the Victorian Charter

- 3.1 The introduction of the Victorian Charter was staggered over 18 months. From 1 January 2007, all Bills introduced to Parliament were required to have accompanying statements of compatibility, while the obligations on public authorities and court functions began from 1 January 2008.
- 3.2 The staggered commencement of the Victorian Charter had the benefit of allowing the Victorian Government to undertake a number of proactive steps, outlined below, in preparation for the full commencement of the Victorian Charter.
- 3.3 A staggered commencement was particularly important for agencies with a service delivery focus. For example, for the Department of Human Services ('DHS') the lead in time prior to commencement was valuable in enabling the department to consider the application of the Victorian

National Human Rights Consultation: Victorian Government Submission

Charter to its day-to-day business and to proactively incorporate the Victorian Charter into its operations.

Leading the Implementation

- 3.4 The Victorian Government established a Human Rights Unit ('HRU') within the Department of Justice ('DOJ'). The HRU has been responsible for co-ordinating a consistent approach to the implementation of the Victorian Charter.
- 3.5 DOJ continued to convene a Human Rights Interdepartmental Committee with senior representatives from each department and key agencies, to assist the department with its whole-of-government role and to oversee the implementation of the Victorian Charter across government.
- 3.6 DOJ also established a Human Rights Leadership Forum, chaired by Mr Brian Tee MLC. The forum consists of senior people from across the public sector- including Victorian Government Departmental secretaries and the Chief Commissioner of Police - local government, the community sector and business. The purpose of the forum is to forge partnerships of human rights leaders from all sectors and spheres of government and the community to drive successful Victorian Charter implementation and provide leadership for promoting a human rights culture across the community.

Education and communication

- 3.7 One of the most crucial factors in ensuring a smooth implementation was the across-government training and education campaign, facilitated by the HRU, which helped to raise awareness and understanding of the Victorian Charter. It was also aimed at ensuring that public officials and public authorities were prepared for the Victorian Charter provisions relating to service delivery and decision-making.
- 3.8 The main components of the training were human rights training for legal and legislative policy officers across government, and human rights implementation training for general policy staff and 'front-line' service providers.
- 3.9 DOJ also supported the Judicial College of Victoria in developing training for judges, magistrates and tribunal members on the Victorian Charter.
- 3.10 DOJ developed a six-month whole-of-government communications campaign to inform and educate public sector staff about their obligations under the Victorian Charter. The communications strategy included the production of a DVD, fact sheets, the delivery of seminars with human rights themes, and the inclusion of information on the DOJ website.
- 3.11 DOJ also initiated an annual celebration of 'Human Rights Week' across the Victorian Government. This week of awareness-raising activities is focused around International Human Rights Day on 10 December. In addition to whole-of-government activities such as a panel discussion,

National Human Rights Consultation: Victorian Government Submission

seminars and a film, departments are supported to run their own communications activities.

- 3.12 Other government departments also took significant first steps in communication and education activities to prepare for the commencement of the Victorian Charter obligations. The Commission reported in its 2007 Report on the Victorian Charter entitled 'First Steps Forward', that these activities included staff training, modification of induction and orientation processes, using IT tools to facilitate information sharing, and identifying and providing information to public authorities (see Chapter 3).
- 3.13 The Commission reported that there were differences in levels of preparedness and that those agencies which had received funding for implementation initiatives had a broad range of programs in place. For example, DHS ran human rights training for policy staff, developed an orientation DVD and other IT tools to facilitate communications, developed a human rights ambassador program and conducted regional information sessions in partnership with the Commission.
- 3.14 Victoria Police ('VicPol') also received funding to prepare for the commencement of the Victorian Charter. The Commission noted that VicPol conducted human rights seminars for staff and senior managers, developed targeted training and resource materials for prosecutors, established a Human Rights Research Unit and included a human rights component in induction courses for new recruits and in leadership and management development courses. Victoria Police will be making a separate submission to the National Consultation.

Legislative and policy review

- 3.15 Prior to the commencement of the Victorian Charter, the government commenced a review of legislation for compatibility with the Victorian Charter, coordinated by the DOJ. The outcomes of the review of legislation are discussed further in the next section.
- 3.16 To assist the government to integrate human rights considerations into policy development and legislative reviews and proposals, the HRU drafted comprehensive guidance material and templates. These include the *Charter of Human Rights and Responsibilities Guidelines for Legislation and Policy Officers in Victoria* ('the Guidelines') which give a detailed explanation of all of the rights protected by the Victorian Charter. They are designed to equip legal and policy officers with the necessary information to enable them to identify and integrate human rights considerations into legislation and policy development. The HRU also developed guidance material for departments to identify and engage with public authorities on their obligations under the Victorian Charter.
- 3.17 From 1 January 2007, the HRU was also responsible for reviewing statements of compatibility and providing legal analysis of policy and draft legislation. This often involved researching the law and practice of human rights and identifying and responding to emerging human rights issues.

National Human Rights Consultation: Victorian Government Submission

- 3.18 These initiatives have had positive results. The Commission noted: 'The human rights vetting processes developed by DOJ are comprehensive and statements of compatibility from 2007 demonstrate a high level of engagement with these procedures across portfolios. The preparedness of agencies is further reinforced by the significant work undertaken to review not only existing Acts but also existing regulations.' (page 22.)
- 3.19 The HRU and the Victorian Government Solicitor's Office have also established an online Human Rights Portal as a resource for Victorian Public Servants to enable them to fulfil their obligations under the Charter. The Portal provides extensive human rights information for government staff that develop or review policy and legislation or provide legal advice on Victorian Charter issues.

4 The impact of the Victorian Charter on government

- 4.1 The Victorian Charter came into full operation on 1 January 2008. The parliamentary processes have been in place for almost two and a half years; the court functions and obligations on public authorities for almost 18 months.
- 4.2 The protection of human rights has always been a concern of government, and the consideration of human rights issues in the policy development framework is not new to government. However, the articulation of fundamental rights in the Victorian Charter has given focus and priority to the task of considering human rights and has provided a benchmark and framework for this process. The assessment of human rights issues is therefore undertaken in a more consistent and comprehensive way.
- 4.3 The Victorian Charter is already having an impact. There have been numerous changes in government processes that have strengthened democracy in Victoria. These have resulted in more transparent and accountable government actions and improved scrutiny of government decision-making.

Legislation

- 4.4 The Cabinet approved a set of Guidelines to ensure that human rights considerations are included in policy development. Legal and policy officers are required to identify human rights impacts of all proposed policies and Bills to ensure that any limitations of rights are reasonable and proportionate to the purpose of the policy or Bill. This has resulted in numerous amendments to reduce adverse human rights impacts even before a policy or Bill is considered by Cabinet.
- 4.5 The Guidelines also require that the HRU is consulted in relation to all statements of compatibility and the HRU continues to provide advice across government on the Victorian Charter compatibility of draft legislation.

National Human Rights Consultation: Victorian Government Submission

- 4.6 The requirement that Bills in Parliament are accompanied by a statement of compatibility has ensured that any limitations on rights are identified and explained to Parliament, and can inform any debate about the Bill. In its latest report on the operation of the Victorian Charter entitled 'Emerging Change,' the Commission found that during 2008, the Parliamentary debate concerning 18 Bills included discussion about the human rights implications of those Bills (page 71.)
- 4.7 As of March 2009, over 200 statements of compatibility had been tabled in Parliament, and are publicly available on the internet. None of the statements of compatibility tabled to date have identified a provision that is incompatible with the Victorian Charter.
- 4.8 The statement of compatibility requirement under the Victorian Charter differs in two key respects from other jurisdictions, such as New Zealand. First, the requirement to table a statement of compatibility rests with the responsible Minister, rather than with the Attorney-General. Second, the Victorian Charter requires that the statement of compatibility set out the reasons as to how the proposed legislation is compatible with human rights, or if it is not, the nature and extent of the incompatibility.
- 4.9 These two features of the Victorian Charter have been important in achieving the objectives of the Victorian Charter in improving the consideration of human rights impacts in the legislative development process and improving the transparency and accountability of government. The requirement for the responsible Minister to table the statement of compatibility has ensured that there is ownership and responsibility for the Victorian Charter across the different portfolios of government. The requirement for statements of compatibility to contain a detailed analysis of the rights impacts of the proposed legislation has been important in ensuring the integrity, credibility and transparency of the process.
- 4.10 Section 30 of the Charter accords SARC the role of considering any Bill introduced into Parliament and reporting back to the Parliament on whether any Bill is incompatible with the Victorian Charter. The Commission has noted in its latest report that SARC has approached this role with diligence and has requested additional information from Ministers in relation to numerous Bills.
- 4.11 The across-government review of legislation that commenced in 2007 has confirmed that the vast majority of legislation is compatible with the Victorian Charter. The review is ongoing, and a number of pieces of legislation are subject to broader separate reviews, for example, the *Mental Health Act 1986*.
- 4.12 Several provisions in legislation which were potentially incompatible with the Victorian Charter and were appropriate to amend at that stage were identified, and were included in the *Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009*, introduced into Parliament at the beginning of 2009. This Bill will amend seven Acts from across-government to improve their Victorian Charter compliance.

National Human Rights Consultation: Victorian Government Submission

- 4.13 Overall, the Commission has noted that human rights responsibilities under the Victorian Charter have been integrated into the legislative process and the Victorian Charter has expanded the parameters of public policy in Victoria to include a transparent assessment of new laws against a human rights framework.

Service delivery

- 4.14 Since 1 January 2008, public authorities have been required to act compatibly with the human rights protected by the Victorian Charter and consider relevant human rights when making decisions.
- 4.15 The Victorian Charter provides a list of persons who are included as public authorities, which includes public officials, VicPol, Ministers, local Councils and council staff. In addition, a private individual or organisation may be a public authority when it is exercising functions of a public nature carried out on behalf of the state or on behalf of another public authority.
- 4.16 The obligation on public authorities has reinforced existing service delivery frameworks, and provided a comprehensive mechanism for the consideration of human rights issues in the service delivery context.
- 4.17 The obligation on public authorities is one of the most important features of the Victorian Charter, as it is in the delivery of services by public authorities that most people interact with government on a daily basis. The obligation on public authorities is therefore of most practical relevance for the community and for individuals.
- 4.18 Victoria's experience illustrates that the Victorian Charter is having an important impact on the way the government delivers services, by articulating a clear framework for protecting individual rights and creating an obligation on public authorities to act compatibly with human rights.
- 4.19 In its latest Report, the Commission states that the Victorian Charter is affecting policies and service delivery, generally by 'reinvigorating or reinforcing existing ethical frameworks and principles of practice.' It notes that the Victorian Charter plays an important role in articulating existing principles within the Charter framework and 'elevating them to the status of a law.' The Victorian Charter also contains a methodology for balancing individual rights in service delivery against other important objectives (page 36).
- 4.20 The Commission notes that during 2008, the government provided support to related entities that are public authorities to ensure that they are aware of and are in a position to comply with their Victorian Charter obligations. The support consisted of providing access to departmental materials and training, and assistance with the development of specific resources (page 21).
- 4.21 The obligation on public authorities to act compatibly with the human rights in the Victorian Charter has been reinforced by the incorporation of a public sector value into the code of conduct for Victorian public sector

National Human Rights Consultation: Victorian Government Submission

employees. The new public sector value provides that public officials must respect and promote human rights by making decisions and providing advice consistent with human rights and by actively implementing, promoting and supporting human rights. The heads of public sector bodies must also establish employment processes that will ensure that human rights are upheld.

4.22 There are also new reporting obligations within government. For example, the *Multicultural Victoria Act 2004* has been recently amended to require government departments to report yearly on any measures taken by them to promote human rights in accordance with the Victorian Charter for multicultural communities. This requirement provides additional monitoring of governmental initiatives to protect people who may be more vulnerable than most to human rights breaches.

4.23 A number of other examples of the impact of the Victorian Charter on service delivery and operational procedure are set out below.

Additional functions

4.24 The Victorian Charter also extended the Victorian Ombudsman's functions to include a new power to enquire into or investigate whether any administrative action is incompatible with human rights. This power extends to matters that the Ombudsman may conduct on his or her own motion, as well as enquiries or investigations initiated as a result of a complaint.

4.25 The Ombudsman already promotes fairness, integrity, respect for human rights and administrative excellence in Victoria. Conferring the human rights complaint handling function on the Ombudsman took advantage of the significant experience of the Ombudsman's office in considering complaints about human rights prior to the enactment of the Charter.

4.26 In the Ombudsman's 2007-8 Annual Report, the Ombudsman reported on a number of human rights issues which he had investigated and had brought to the government's attention, and the outcome of those investigations.

4.27 The Ombudsman therefore plays an important role in building a human rights culture in Victoria and ensuring the successful implementation of obligations under the Victorian Charter.

4.28 The Commission also plays a very important role under the Victorian Charter in providing human rights education to the community and reporting to government on an annual basis on the government's progress in successfully implementing the Victorian Charter. The work of the Commission is fundamental in ensuring that the community understands the practical relevance of the Victorian Charter and that information about the Victorian Charter is delivered in a non-legalistic and accessible manner.

National Human Rights Consultation: Victorian Government Submission

- 4.29 In its latest Report, the Commission details its activities which aim to demystify human rights and build understanding of the rights protections contained in the Victorian Charter throughout the community.

Local Government

- 4.30 The full operation of the Victorian Charter from 1st January 2008 heralded significant change for the day-to-day work of local government. The Victorian Charter obligation on public authorities to act in a way that is compatible with human rights and to give proper consideration to human rights when making decisions, applies to Councils, Councillors and certain members of Council staff.
- 4.31 A human rights approach to public sector decision making and service delivery is vital at all levels of government - national, state and local. It is important that members of the community, who often will not make the distinction and recognise which level of government they are interacting with, are able to expect that government as a whole will treat them with respect and dignity.
- 4.32 Because of the proximity of local councils to their respective communities, and the vital nature and breadth of the services they are responsible for providing, many of the actions and decisions made by council will trigger human rights contained in the Victorian Charter. As such, implementation of the Victorian Charter at the local government level is critical to its success.
- 4.33 In its latest report, the Commission notes that 58 Councils have incorporated materials based on the Victorian Charter into their training and professional development programs. A number of Councils are also reviewing policies, procedures and local laws in response to the Victorian Charter (see chapter 6).
- 4.34 To support implementation of the Victorian Charter at the local government level, the Victorian Government is providing financial support to the Victorian Local Governance Association to run a 'Human Rights Matter Locally' project.
- 4.35 As the Commission notes, the aim of the project is to explore the relationship between human rights and the role of local government 'to ensure that human rights are understood to be more than legal or technical assessment standards, but principles that are directly relevant to the work of local government and that can significantly improve outcomes'. Another aim is to 'embed measurable milestones for human rights achievements' at the local government level and to develop and implement practical and supportive tools to see that human rights respecting communities are encouraged and sustained around Victoria (pg 49-50).

National Human Rights Consultation: Victorian Government Submission

Examples

- 4.36 The Victorian Charter has had an impact on the development of legislation, policy and service delivery in a diverse range of contexts in every area of government, including human services, justice and corrections, education and the environment. Often the impact of the Charter leads to the careful balancing of competing policy imperatives on the basis of proportionality considerations, leading to a power being circumscribed or the inclusion of additional safeguards in relation to the exercise of a power.
- 4.37 The following case studies are just a handful of the many examples of specific instances where Victorian Charter considerations have resulted in practical improvements to laws, policies and procedures.

Rights of people with a mental illness (1)

One example of the impact of the Charter on policy development is in relation to the review of the Victorian *Mental Health Act 1986*. The Minister for Mental Health, the Hon Lisa Neville MP, announced a review of the Act on 8 May 2008.

The review is examining whether the Act provides an effective legislative framework for the treatment and care of people with a serious mental illness in Victoria. The review will also consider whether the Act appropriately protects human rights in light of the Victorian Charter.

A public consultation process sought community input on the review of the Act including how it might be reframed to better protect and promote human rights.

For example, supporting patients to participate in decision making is a key contributor to the effective protection of human rights. Section 10(c) of the Charter provides that a person must not be subjected to medical treatment without his or her full, free and informed consent. One of the concepts considered in the consultation paper in response to the need to improve patient participation is the introduction of an advance statement scheme. In recognition that mental illness is episodic, an advance statement would provide a patient with an opportunity when they are well, to specify their wishes and preferences in treatment and care. An advance statement would allow involuntary treatment decisions to be informed by the patient's wishes and preferences.

The human rights of mentally ill people is therefore a central consideration in the development of the government's policy regarding mental health in Victoria.

National Human Rights Consultation: Victorian Government Submission

Rights of people with a mental illness (2)

In the recent decision of *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, the Victorian Civil and Administrative Tribunal ('the Tribunal') made a declaration that an individual's right was breached by a procedural failure of a public authority. This was an important decision, as it was the first time that a Tribunal or Court has made such a declaration.

This case was a merits review before the Tribunal of a decision of the Mental Health Review Board to confirm the involuntary treatment orders of the applicant under the *Mental Health Act 1986*. The applicant was a patient diagnosed with a mental illness living in the community who is required to take medication administered pursuant to treatment orders under the *Mental Health Act*. The *Mental Health Act* establishes a scheme for the involuntary treatment of patients, and requires the Board to conduct periodic reviews of involuntary treatment orders at specific intervals.

In this case the Board had not reviewed the relevant orders as required under the Act. The Tribunal held that the Mental Health Review Board was a public authority and it had breached the applicant's right to a fair hearing. However, the Tribunal confirmed overall that the making of involuntary treatment orders under the *Mental Health Act 1986* strikes the right balance in relation to the rights of people with a mental illness to protection from medical treatment without consent, the right to privacy, and the right to freedom of movement. This case confirms that the Victorian Charter is working effectively to bring to light important human rights issues.

Rights of people with a disability (1)

The Department of Human Services provides supported accommodation for people with a disability. At one particular community residential unit where five residents lived, a locked doors policy applied. The locked doors policy aims to ensure the safety and security of the residents. The house is on a busy road and staff feel that if the doors are not locked, then one of the residents, who has a tendency to wander off, may leave the house and go onto the road.

The Victorian Charter reinforces the principles underpinning the provision of support to people with a disability. Having regard to the Victorian Charter, the house supervisor reviewed the application of the locked door policy within the house and decided that of all the residents, there was only one resident who might put herself at harm if she left the house without staff support. To help this resident, the house supervisor arranged for a psychologist to develop positive behaviour support strategies with her so that she could tell staff when she wanted to go for a walk. These strategies have become part of her behaviour support plan.

The four other residents were given their own key to the house and two purchased mobile phones so they could call for assistance if they became lost or anxious. All were encouraged to let support staff know when they were leaving the house and how long they were going to be out so staff could provide support as required. Although the doors of the house continued to be locked, the review resulted in the restrictions on the rights of the other residents being removed and less restrictive options put in place for the one resident at risk of harm.

National Human Rights Consultation: Victorian Government Submission

Rights of people with a disability (2)

Many of the examples of the impact of the Victorian Charter on service delivery and operational procedures have been identified by community organisations. For example, the Victorian Council of Social Service published a report in July 2008 entitled *Using the Charter in Policy and Practice* which contains a number of examples of the impact of the Charter on service delivery.

One case study concerns a local disability provider that implemented a new system in which its routine assessment of client needs included explicit consideration of their human rights through a mandatory Human Rights Checklist. As a result of implementing these new processes, the services became aware of a number of people with intellectual disabilities whose ability to exercise their right to vote had been restricted. The service took immediate steps to support them to be able to make individual decisions about how they would vote.

Indigenous Cultural rights

The *Forests (Recreation) Regulations 2009* regulate camping, recreation grounds, and roads in state forests, and provide for the management and care of forest reserves. This includes restricting or prohibiting access to certain areas and setting aside certain areas for specific purposes.

Careful consideration was given to the Regulations to ensure that restrictions on access and use of certain land within state forests did not unduly impinge on indigenous cultural rights under section 19(2) of the Victorian Charter.

In particular, amendments were made to the proposed Regulations to permit 'Traditional Owners' to undertake 'Aboriginal tradition' within state forests, forest parks and certain forest reserves covered by the proposed Regulations. The definitions are consistent with definitions in the *Aboriginal Heritage Act 2006* and the proposed definition of 'Aboriginal tradition' promotes indigenous cultural rights by avoiding the need to provide an exhaustive list of what activities may or may not be considered a traditional activity.

Challenges

- 4.41 This section has illustrated the numerous areas in which the Victorian Charter has made a positive difference. As with any new policy initiative, there have also been challenges.
- 4.42 In some cases, challenges arise where there are different views within government about the appropriate limits to human rights and getting the balance right. Many of the issues raised that involve competing rights and interests are not new, but the Victorian Charter has given a heightened focus to these policy issues. The Victorian Charter provides a benchmark for considerations regarding human rights in this context

National Human Rights Consultation: Victorian Government Submission

and facilitating discussion about the appropriate balance between competing rights and interests.

- 4.43 Challenging considerations have arisen where there is a need to balance the rights of individuals with the need to protect the broader community. For example, balancing competing rights and interests is a central task of the Victorian Adult Parole Board and the Youth Parole Board. The implications of the Charter for the operation of these Boards is complex and the Victorian Government is continuing to work through the issues involved.
- 4.44 In addition, it has been important in the early stages of Charter implementation to provide guidance to organisations which provide services on behalf of government regarding whether they fall within the definition of public authority under the Charter. Modern service delivery arrangements can be complex and can take a number of different forms and the definition of public authority is not prescriptive about which of such organisations the Victorian Charter applies to. For organisations at the margins of the definition the government advocates that Victorian Charter compatible policies be adopted as best practice.

5 The impact of the Victorian Charter on the courts since 1 January 2008

- 5.1 The courts play a critical role in enforcing the obligation on public authorities and contributing to the human rights dialogue between the various arms of government.
- 5.2 Since 1 January 2008, courts have been required to interpret legislation consistently with the Victorian Charter so far as this is possible consistently with the purpose of the legislation.
- 5.3 The fulfilment by the courts of their functions and obligations under the Victorian Charter have therefore only been in operation for just over 12 months. Further, the transitional provisions of the Victorian Charter, which state that the Charter does not affect any court proceedings commenced before 1 January 2007, means that the Victorian Charter is only just starting to have application to many proceedings.
- 5.4 Nevertheless, the Victorian Charter has had an effect on the interpretation of law by the courts and the outcome of proceedings. There have been a number of significant decisions which indicate that the courts are performing their functions under the Victorian Charter in a measured and careful way, confirming the importance of the Victorian Charter in shedding light on important human rights issues.
- 5.5 The Victorian Charter has arisen in a diverse range of areas and contexts, at all levels of the legal system including the Tribunal and the courts. For example, the Victorian Charter has been raised in proceedings relating to freedom of information law, orders made under the *Mental Health Act*, public housing, superannuation and pensions, and the right to bail, to name a few. In the criminal law area, the Victorian Charter codifies fundamental criminal process rights which have been

National Human Rights Consultation: Victorian Government Submission

protected in the common law for many years, such as the right to a fair trial including the right to be tried without unreasonable delay. To date the Victorian Charter has not significantly changed the way courts are already approaching issues under the common law.

- 5.6 The Attorney-General has the right to intervene in any proceeding before any court or tribunal in which a question of law arises that relates to the application of the Victorian Charter (section 34), as discussed further below. The Commission has a similar right of intervention. The Attorney-General and the Commission must be notified if a question of law arises that relates to the application of the Victorian Charter in a Supreme Court or County Court proceeding.
- 5.7 When the Attorney-General intervenes in a matter raising the Victorian Charter, he or she becomes a party to the proceeding. The Attorney-General's intervention role serves a number of purposes, including:
 - 5.8.1 It assists in providing greater consistency with respect to the interpretation and application of the Victorian Charter. In contrast to many other jurisdictions, the model adopted in Victoria is a decentralised one that involves all government agencies and all levels of courts in the interpretation and application of the Victorian Charter.
 - 5.8.2 It ensures that when interpreting and applying the relevant rights, courts and tribunals have been provided with the benefit of international jurisprudence from jurisdictions with a well developed understanding of human rights law. This is crucial in the development of early jurisprudence in relation to the Victorian Charter that provides appropriate guidance for government bodies and lower courts.
 - 5.8.3 Where a declaration of inconsistent interpretation is sought, it ensures that a reasonable opportunity is given to a Minister responsible to Parliament to respond. This is particularly important given that government generally bears the onus of establishing that a limit on a right is reasonable and justified.
- 5.9 Generally, when the Attorney-General has intervened he has taken a role of assisting the court in the interpretation and application of the Victorian Charter rather than taking an adversarial interest in a particular outcome. For example, the Attorney-General will intervene where divergent approaches have been taken to particular rights in different international jurisdictions. Courts and tribunals have noted the benefits from this assistance in dealing with individual cases.
- 5.10 As of 6 May 2009, the Attorney-General has been notified of Victorian Charter matters arising under section 35 of the Charter in 42 cases. The Attorney-General has intervened in 13 cases where the Victorian Charter has been raised by the parties and it was in the public interest to do so because a significant question about human rights required consideration.

National Human Rights Consultation: Victorian Government Submission

6 The costs of implementing the Victorian Charter

- 6.1 In 2006-07, the government allocated total funding of \$6.5m for human rights initiatives over 4 years to cover a number of agencies including Victoria Police, Corrections Victoria, the Department of Human Services, the Department of Justice and the Commission.
- 6.2 As at April 2009, the HRU consists of a manager, four legal policy officers and a part-time administrative officer. Rather than acting as a specialist unit responsible for vetting all proposed legislation across government, the HRU provides resources, support and expert advice to officers across government, who undertake their obligations under the Victorian Charter as part of their ordinary work. Some Departments have also provided additional resources to prepare for the commencement of the Charter.
- 6.3 By building human rights consideration into policy development processes, the Victorian Charter adopts a devolved model which is designed to improve consideration of human rights issues in all parts of government, rather than this expertise residing in a specialist unit. The costs of meeting the Victorian Charter obligations are therefore spread across government and absorbed into the ordinary work of policy officers in developing policy and legislation.

7 The review of the Victorian Charter in 2011

- 7.1 The Victorian Charter takes an incremental approach to human rights protection. It protects fundamental civil and political rights and sets out a timeframe for a review of the Victorian Charter to consider, amongst other matters, whether additional rights should be protected.
- 7.2 The government must conduct a review of its first 4 years of operation and table a report in Parliament of the review by 1 October 2011.
- 7.3 The review is potentially very broad, and will evaluate the impact of the Victorian Charter in its first 4 years of operation.
- 7.4 Section 44 of the Victorian Charter further provides that the review must include consideration as to whether:
- additional human rights should be included in the Victorian Charter, including rights under the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the Convention on the Rights of the Child ('CROC') and the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW');
 - the right to self-determination should be included in the Victorian Charter;
 - regular auditing of public authorities to assess compliance with human rights should be made mandatory; and
 - further provision should be made in the Victorian Charter with respect to proceedings that may be brought or remedies that may

National Human Rights Consultation: Victorian Government Submission

be awarded in relation to acts of unlawfulness under the Victorian Charter.

- 7.5 It is not the intention of this submission to pre-empt the outcome of the 2011 review, which will involve a public consultation process. The review will be an important opportunity to evaluate the impact of the Victorian Charter and ensure its ongoing relevance and effectiveness.

8 Conclusion

- 8.1 Part 1 of this submission illustrates the numerous benefits of the Victorian Charter experience to date.
- 8.2 The Victorian Charter was the result of a public consultation process which revealed overwhelming support for a change in the law to better protect human rights in Victoria.
- 8.3 The Victorian Charter is strengthening democracy in Victoria by requiring that human rights are taken into account in the development of laws and policies, government decision-making and service provision. The obligation on government and other bodies exercising public functions on behalf of the state to observe human rights is benefiting people in their dealings with government- be they Indigenous Australians, the mentally ill or people with a disability.
- 8.4 Importantly, the Victorian experience also shows that a Charter does not transfer power to unelected judges, nor is it a 'lawyers' picnic.' There have been a relatively small number of cases in which Victorian Charter arguments have been raised and no declarations of inconsistent interpretation have been made to date.
- 8.5 The potential to achieve better human rights protection and better government via a human rights Charter are at the heart of Victoria's support for a Federal Charter. Part 2 of this submission outlines Victoria's position in relation to a Federal Charter, including the preferred form of Charter and the rights that should be protected.

National Human Rights Consultation: Victorian Government Submission

PART 2: RESPONSE TO THE TERMS OF REFERENCE OF THE NATIONAL CONSULTATION

9 The Victorian Government supports the enactment of a Federal Charter.

- 9.1 The Victorian Government supports the enactment of a Federal Charter to recognise, protect and promote human rights at the national level.
- 9.2 The positive benefits of a Charter in Victoria, outlined in the previous section, should be available at the national level to all people in this country.
- 9.3 When the Victorian Charter was introduced, the Victorian Attorney General Rob Hulls said the Charter was designed:
- to provide ‘a powerful tool in assessing whether human rights protection in Victoria reaches minimum standards’;
 - to ‘promote better government, by requiring government laws, policies and decisions to take into account civil and political rights’; and
 - to ‘make sure that there is proper debate about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society.’
- 9.4 These objectives are equally fundamental in a national context.
- 9.5 The advantages of a Federal Charter are set out below. Many of the same reasons given in support of the enactment of the Victorian Charter apply also at the federal level.

Improve national human rights protections

- 9.6 A Federal Charter would list in one document the basic human rights that all people hold and would ensure that these rights are comprehensively protected at the national level in Australia.
- 9.7 Currently, the federal protection of human rights is a piecemeal collection of provisions in various Acts and the common law. (This was also the case in Victoria, prior to the enactment of the Victorian Charter.)
- 9.8 Articulating fundamental human rights in a legislative instrument provides a framework to facilitate discussion regarding human rights issues and ensures that human rights are considered in a consistent and comprehensive fashion. Without an instrument which articulates fundamental rights, the protection of rights is developed in an ad hoc fashion through the common law.
- 9.9 The Australian Constitution protects very few rights explicitly and some only by implication. For example, the right to freedom of political communication is only protected by implication drawn from the Constitution (*Australian Capital Television Pty Ltd v Commonwealth*

National Human Rights Consultation: Victorian Government Submission

(1992) 177 CLR 106.) It is not a guarantee of free speech generally but only protects communication relating to political and governmental matters to ensure that there is free and informed choice in a democracy.

- 9.10 There is some legislation that protects particular human rights at the federal level, such as the *Racial Discrimination Act 1975 (Cth)*, the *Sex Discrimination Act 1984 (Cth)*, the *Disability Discrimination Act 1992 (Cth)* and the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*. There are also more general statutes and principles of the common law that protect human rights such as laws constraining police powers and some laws pertaining to criminal trials.
- 9.11 However, Australia is one of only a few Western countries that does not have an instrument to comprehensively protect human rights at the domestic level.
- 9.12 In its recently released Concluding Observations following a review of Australia's compliance with the ICCPR, the UN Human Rights Committee noted the lack of comprehensive human rights protection at the federal level and recommended that Australia enact human rights legislation to give full effect to the ICCPR provisions across the country. (See CCPR/C/AUS/CO/5, 2 April 2009.)

To provide governance standards for government

- 9.13 A Federal Charter is an important tool for ensuring that human rights protection meets minimum standards. It will provide a framework for the consideration of human rights in the development of Commonwealth laws and policies, in Commonwealth Government decision-making and service-delivery. In the vast majority of cases, the minimum standards articulated in human rights legislation are achieved or exceeded. A Federal Charter would however provide a safeguard to ensure that fundamental rights are comprehensively and consistently considered.
- 9.14 Enacting a Federal Charter will not stop the Federal Government from passing laws that limit rights when this is required in the public interest. It will mean, however, that there is more consistent scrutiny of whether any rights-limiting proposals strike the right balance between the human rights of Australians and the objectives that the proposals are seeking to achieve. A Federal Charter framework will also limit the possibility of inadvertent restrictions on human rights.
- 9.15 A Federal Charter will promote better government in Australia by enhancing the quality of Commonwealth Government decision-making. The early assessment of human rights impacts will also build public confidence that government processes will prevent human rights breaches before they arise. This is certainly the experience in Victoria where human rights considerations often result in changes being made in the policy and legislative development process, before introduction of legislation into Parliament and before there is any effect on the public. This is consistent with the 'dialogue model' of rights protection where the focus is on prevention of human rights breaches rather than litigation.

National Human Rights Consultation: Victorian Government Submission

- 9.16 A Federal Charter should direct the courts to interpret the law consistently with human rights where possible. This will signal the importance of Australia's international human rights obligations in Australia and ensure that Australian law develops consistently with international human rights jurisprudence.
- 9.17 Where courts are not able to interpret a particular law consistently with the Federal Charter courts have an important role to play in communicating an inconsistency back to the government. It would then be for the government to respond. There is no constitutional barrier to such a model (see further below).
- 9.18 By developing better governance with a Federal Charter, Australia's overseas credibility and reputation as a human rights leader will be enhanced. Australia will be able to claim to be in step with its peers in Europe, the United Kingdom, New Zealand, Canada and other parts of the world as a modern democracy committed to human rights. This is particularly in the context of our own region. Australia is a human rights leader in the Asia-Pacific region, and having a Federal Charter would help to set the benchmark in the context of conversations between Australia and its neighbours, for example, when Australia makes statements opposing the death penalty in Indonesia or Singapore as contrary to fundamental human rights.
- 9.19 To ensure that the benefits of a Federal Charter are realised within government and the courts, the Consultation Committee should consider adopting a staggered or delayed commencement date in order to provide sufficient time to allow government and the courts to prepare for the commencement of obligations.

Provide additional protection for disadvantaged people

- 9.20 The Victorian Government is committed to addressing social disadvantage and systemic discrimination. This is reflected in a number of important recent policy documents such as *A Fairer Victoria* (May 2009) and the Attorney General's *Justice Statement* (May 2004) and *Justice Statement 2* (October 2008).
- 9.21 The enactment of the Victorian Charter was consistent with these policies and reflected many stories heard during the consultation process about the impact of a lack of human rights protections in the lives of disadvantaged people.
- 9.22 People who were identified as being particularly vulnerable to having their human rights breached included people with physical disabilities, people with intellectual disabilities, older people, young people, women, members of culturally and linguistically diverse communities, Indigenous Australians, members of gay, lesbian, bisexual, transgender and intersex communities, and homeless people.
- 9.23 These people reported a range of human rights failures including breaches of civil and political rights such as discrimination issues and

National Human Rights Consultation: Victorian Government Submission

barriers to participation in public life. Some of these failures were unintended, that is, sometimes seemingly ordinary laws disproportionately affected their human rights because they were otherwise disadvantaged and the laws had an adverse impact on them beyond any impact on others in the community.

- 9.24 Many of the issues faced by marginalised and disadvantaged people in Victoria are equally pressing concerns federally. A Federal Charter would provide enhanced legal protection for those people who are most in need of it.

To educate people about their rights and responsibilities and encourage a human rights culture

- 9.25 An important objective of introducing a Federal Charter is to educate people about their rights and responsibilities.
- 9.26 During the Victorian Consultation, it was observed that people often had strong views based on their personal experiences, for example, of disability, racial discrimination or a lack of dignity for an aged relative but did not necessarily have a conception of the issues in terms of specific human rights failures.
- 9.27 Similarly, the introduction of a Federal Charter presents an important opportunity to begin to frame issues in terms of human rights and to promote the language of human rights. It will also encourage a national human rights culture based around equality and human dignity and fulfil an important educative role, both in the community and across government.

10 The Victorian Government supports a Federal Charter that preserves the operation of the Victorian Charter and does not undermine Victorian sovereignty.

- 10.1 The Victorian Government supports the need for national human rights protection.
- 10.2 The Victorian Government believes that the best way to further this goal is to enact a Federal Charter based on the legislative “dialogue” model introduced in Victoria and the ACT.
- 10.3 In particular, we support the enactment of a Federal Charter that applies to federal public authorities only and does not apply to the states, for the reasons outlined below.
- 10.4 Firstly, this would enable the Victorian Charter to continue to operate alongside a Federal Charter. This is important given the extensive amount of time and resources that the Victorian Government has invested in developing and implementing the Victorian Charter. The Victorian Government would be very reluctant to have to abandon this work and start again with a Federal Charter that applied to the states and was significantly different in content to the Victorian Charter.

National Human Rights Consultation: Victorian Government Submission

- 10.5 Secondly, there are too many constitutional uncertainties associated with a Federal Charter that purported to 'cover the field' and apply to the states as well as the Commonwealth. A Federal Charter in this form may well be constitutionally invalid. For instance, a Federal Charter that sought to impose obligations:
- 10.5.1 on state Members of Parliament to prepare and table compatibility statements; and
 - 10.5.2 on all state public authorities to act compatibly with human rights could be invalid for breaching the *Melbourne Corporation* doctrine (*Melbourne Corporation v Commonwealth* (1947) CLR 31; *Re Australian Education Union; ex parte Victoria* (1995) 184 CLR 188). (This doctrine refers to an implied limitation on the legislative power of the Commonwealth to interfere with the core functions of state governments in a manner that impairs the exercise of their constitutional powers or their capacity to govern.)
- 10.6 Similarly, a Federal Charter that sought to impose obligations on state courts and others to interpret state laws compatibly with human rights might be invalid for the reason that a Commonwealth law cannot itself directly operate on the construction of a state law. This is consistent with the view expressed by the round table of Constitutional and Human Rights lawyers convened by the Australian Human Rights Commission (including Sir Anthony Mason and The Honourable Michael McHugh QC) (6 May 2009) that the constitutional validity of a federal Human Rights Act can be assured to the extent that such an Act applied to federal public authorities only.
- 10.7 Thirdly, a Federal Charter that applies to federal public authorities only would still have significant reach given the increasing number of federal entities performing public functions and, at the same time, would not impede unduly on Victorian state sovereignty. A Federal Charter of this form could then form part of a cooperative scheme whereby other states are then encouraged to enact their own state Charters to complement the Federal Charter.
- 10.8 If the Committee does decide to recommend a Federal Charter that applies to federal public authorities only, the Victorian Government submits that the Federal Charter should cover the same rights as the Victorian Charter. This will lessen the prospects of any inconsistency between the Federal Charter and the Victorian Charter and enable them to co-exist.
- 10.9 Further, there should be a very clear distinction in the Federal Charter between the definition of a federal public authority and a state public authority. This is in order to avoid unnecessary confusion and reduce the risk of any inconsistency between the Federal Charter and the Victorian Charter.
- 10.10 Finally, it might also be possible for a Federal Charter to extend its application to state public authorities that agree to perform *federal* functions. If the Committee decides to recommend this option, the Victorian Government submits that the following additional safeguards should be included in the Federal Charter:

National Human Rights Consultation: Victorian Government Submission

- a. a general limitations clause such as that contained in section 7 of the Victorian Charter; and
- b. a 'defence' for state public authorities that would protect them in relation to action taken pursuant to a state law when the authority could not have reasonably acted differently.

Without these safeguards, the prospect of inconsistency between the Federal Charter and the Victorian Charter is heightened and it might be difficult for the two Acts to co-exist together without conflict.

10.11 The Constitutional issues surrounding the enactment of a Federal Charter are complex. It is imperative that the Committee subject each proposal to careful analytical scrutiny to avoid unforeseen constitutional difficulties. Victoria supports the need for further consultation on these complex matters following the Committee submitting its recommendations to the Commonwealth Government. Victoria also endorses the Joint Statement made by the round-table convened by the Australian Human Rights Commission (6 May 2009), referred to above, that a Federal Charter could be drafted that would be constitutionally valid. The Australian Constitution is no barrier to an effective Federal Charter.

11 The Victorian Government's preference for a Federal Charter that protects civil and political rights, with a view to considering economic, social and cultural rights at a later stage.

11.1 As discussed above, the Victorian Government supports a Federal Charter which protects the same civil and political rights which are contained in the Victorian Charter, such as the right to vote, freedom of expression and the right to peaceful assembly. It should also include the protection of the specific cultural rights of Aboriginal persons which is included in section 19 of the Victorian Charter.

11.2 The Victorian Consultation Committee considered that civil and political rights were essential entitlements of all Victorians and recommended their inclusion in what became the Victorian Charter. The rights in the Victorian Charter are largely derived from the ICCPR, adapted to a Victorian context. The protection of civil and political rights in the Victorian Charter was an important step towards better protection of human rights in Victoria.

11.3 As discussed above, Australia is one of the few Western countries not to have legislated to enshrine protection of fundamental human rights contained in the ICCPR at the domestic level. There is ample experience and jurisprudence from countries such as New Zealand and the United Kingdom which show the benefits of enshrining civil and political rights in a national instrument.

11.4 The Victorian Consultation Committee recommended that economic, social and cultural rights such as the right to food, health, housing and education not be included in the Victorian Charter at its inception, but their inclusion should be considered at a later stage, following a review of the experience with the Victorian Charter in its first four years of operation.

National Human Rights Consultation: Victorian Government Submission

11.5 A Federal Charter should take an incremental approach to human rights protection, as the Victorian Charter has done. It is recommended that a Federal Charter include protection of the same civil and political rights that are provided for in the Victoria Charter, including the protection of the specific cultural rights of Aboriginal persons. Further, a Federal Charter should include provision for a comprehensive review after a period of approximately 4 to 5 years, during which time the inclusion of additional rights could be considered.

12 Conclusion

12.1 Sixty years ago, with the adoption of the *Universal Declaration of Human Rights (1948)*, Australians were at the vanguard of the push to bring human rights protection to the world. Yet Australia is one of the few Western nations that does not have comprehensive domestic human rights legislation.

12.2 Some argue that the availability of existing anti-discrimination legislation, as well as the nation's foundational legal document, the Constitution, are ample protection – that it is somehow more Australian to recognise rights in a more low-key way.

12.3 On the contrary, it is a strange idea indeed that it is not part of the national character to make a statement of its collective worth. It is odd to suggest that to make such a statement somehow diminishes or disrespects existing legal instruments. It is odd to suggest that an overly developed sense of pragmatism and 'she'll be right' attitude should prevent Australia from ensuring that, in years to come, decisions and services will be made and delivered with the basic humanity, equality and dignity of all Australians in mind.

12.4 That is what Victoria's recognition of rights and responsibilities is about. It is about ensuring the protection of fundamental rights in every branch of government, and that the business of government is conducted in the public gaze – decisions are made, questioned and answered; policy is changed and developed in a way that is transparent and accountable. The Victorian Government believes that the nation is now up to that same test.

12.5 The Victorian Charter is strengthening Victoria's democracy and improving organisational culture. It is reinvigorating existing principles of practice; causing better and fairer laws to be developed *at first instance*, providing for better service delivery and laying bare the decision making process for all to see.

12.6 This is why the Victorian Charter is an important part of the Victorian Government's commitment to open and accountable government.

12.7 Victoria is proud of the Victorian Charter and of its leadership in the development of a national approach to human rights protection.

National Human Rights Consultation: Victorian Government Submission

12.8 The Victorian Government commends the Federal Government on initiating this national conversation about human rights and urges the National Consultation Committee to recommend a Federal Charter of human rights.

National Human Rights Consultation: Victorian Government Submission

REFERENCES

- Australian Human Rights Commission, *Constitutional validity of an Australian Human Rights Act*, 6 May 2009, at: <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>
- Concluding Observations of the Human Rights Committee, Australia, 2/4/2009 CCPR/C/AUS/CO/5, at: <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>.
- Department of Justice, *Charter of Human Rights and Responsibilities Guidelines for Legislation and Policy Officers in Victoria*, July 2008, at: www.justice.vic.gov.au
- Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, Victorian Government Publication, November 2005, at: www.justice.vic.gov.au .
- Ombudsman Victoria, Annual Report 2008, 10 September 2008, at: <http://www.ombudsman.vic.gov.au/www/html/84-annual-report-2007-08.asp>
- State Government of Victoria, *A Fairer Victoria: Standing Together Through Tough Times*, May 2009, at: www.dpcd.vic.gov.au
- State Government of Victoria, Attorney General's *Justice Statement: New Directions for the Victorian Justice System 2004- 2014*, May 2004, at www.justice.vic.gov.au
- State Government of Victoria, Attorney General's *Justice Statement 2: The Next Chapter*, October 2008, at www.justice.vic.gov.au
- Victorian Equal Opportunity and Human Rights Commission, *First Steps Forward: The 2007 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2008) at: http://www.humanrightscommission.vic.gov.au/pdf/VEOHRC_firststeps_FINALweb.pdf
- Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the operation of the Charter of Human Rights and Responsibilities*, (2009) at: <http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf>
- Victorian Council of Social Service, *Using the Charter in Policy and Practice: Ways in which community sector organisations are responding to the Victorian Charter of Human Rights and Responsibilities*, July 2008, at: <http://www.vcross.org.au>